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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

NO. 175.

GEORGE SCHLOSSER, *Plaintiff in Error,*

—vs—

W. L. HEMPHILL, RICHARD RYAN, AND PALO ALTO COUNTY, IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

ON MOTION OF DEFENDANTS IN ERROR TO DISMISS.

BRIEF FOR PLAINTIFF IN ERROR.

BY CHAS. A. CLARK AND GEO. E. CLARKE.

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ADDITIONAL FACTS.

The attention of the Court is directed to the following facts shown by the Record in addition to those set forth in the brief of counsel for defedants in error. We deem these additional facts requisite to enable the Court to pass upon the motion of defendants in error to dismiss the writ of error

in this case upon the ground that no federal question is involved.

FACTS.

The original survey of the land in controversy was made in 1855. See letter of Secretary of Interior, being Exhibit 26, Record p 75. Also government field notes of original survey, Record 120, last line at bottom of page, and Record 121.

A copy of the plat of this original government survey is in evidence, and found on page 11 of Record, as Exhibit "D".

This plat shows the larger portion of Section 30, in which the land in controversy is situated, and also Section 19, north of said Section 30, to be pond or lake, and not subdivided or surveyed.

The field notes of this original survey are found on pages of the Record 56, 57, and 120-121.

These field notes show a lake on said section 30 and adjoining sections.

The Honorable Secretary of the Interior says of this lake in his letter, Exhibit 25,

"From the official plat of said township it appears that the lake extends into four townships; Viz: townships 96 and 97. Range 34 & 35, is about 5½ miles long, and from half a mile to a mile in with." (Record p 75.)

In that letter, which was dated March 8, 1898, (Record p 74) he ordered a re-survey of the land in said section 30 and other sections. In approving this re-survey the Honorable Secretary of the Interior said in his letter of June 25th, 1898, being Exhibit 26,

"With his report Mr. Barber submitted a plat showing that the land in question is mostly agricultural in character, with a wet, marshy pond called "Mud Lake" covering portions of Sections 25 and 30, with an outlet going west into Trumbull Lake." (Record pp 75-76.)

A plat of so much of the re-survey of Mr. Barber as relates to said Section 30 is in the Record, page 73, as Exhibit 2.

This plat shows a lake on Section 30 at the time of the the re-survey. It gives the meander line of the original survey, under which plaintiff in error claims, and shows the actual margin of the lake to run almost wholly north of the south half of Section 30, which is the land claimed by plaintiff in error under the patent of his remote grantor.

The field notes of this re-survey by Mr. Barber are in evidence as Exhibit 31. (See Record pp 80-81.) These field notes show a lake on Section 30 corresponding with this plat above referred to, being Exhibit 2. The name of this lake is set forth in these field notes as "Mud Lake". The Record

shows throughout that this is the name by which the lake has always been known. The government patent under which plaintiff in error claims is in evidence. It conveys,

"Lots number 2 & 3, of Section 30, * * * * according to the official plat of the survey of said land returned to the General Land Office by the Surveyor General, * * * * To have and to hold the said tract of land, with the appurtenances thereof * * * * forever." (Record pp. 119-120.)

This patent is dated October 10, 1874, practically more than twenty-four years before the re-survey under which defendants in error claim title.

There is no evidence in the Record as to the extent or depth of Mud Lake at the time of the government surveys in 1855. The witnesses for defendants in error first saw this lake, or the land in controversy, as shown below;

P. M. Moore, in 1894 or 5, Record p 34,
J. W. Wilcox, in 1900, Record p 39,
J. T. Painter, in 1890 and 1897, Record pp 41-2.
W. L. Hemphill, in 1890, Record p 45,
M. L. Parr, in 1878, Record p 46,
S. Banfill, in 1871, Record p 47,
Frank Gandy, in 1900, Record pp 52 & 10,
Edward Beatty, in 1890, Record p 57,
E. D. O'Neil, in 1895, Record p 59,
Richard T. Ryan, in 1898, Record p 60,
James Valley, in 1900, Record pp 64 & 10,
Alex. Hemphill, in 1890, Record pp 65 & 10,
Hiram Davis, in 1866, Record p 68,
Edward McNalley, in 1900, Record p 70,
E. B. Evans, in 1898, Record p 71,
Deala Ryan, in 1898, Record p 81,
Jas. Spalding, in 1871, Record 89.

M. L. Parr testified for defendants in error:

"All the lakes up north there, Lost Island Lake, and all the other lakes, were higher twenty years ago than in later years; Lost Island was three or ——— feet higher. Mud Lake correspondingly high." (Record p 46.)

No other witnesses testified to the contrary of this. The trial court, being the District Court of Palo Alto County, Iowa, sustained the contention of plaintiff in error that by virtue of the patent to Anthony, under which he claimed, and the plats and records of the Government Land Office, he became owner of the land in controversy; and decreed that plaintiff in error,

"Is the absolute and unqualified owner in fee simple of lots 2 and 3, section 30, township 97, range 34, including all of the land lying between the Government meander lines,

and the high water mark of a certain body of water known as Mud Lake, as well as the land lying between said meander line and the half section line of said section 30, except the land lying under the high water mark, and being covered by the waters of said lake. He is hereby entitled to immediate possession of said premises, and that a writ of removal issue to remove defendant from the possession of said land." (Record pp 96-97.)

This decree the Supreme Court of Iowa reversed, holding that the government patent under which plaintiff in error claims conveyed to his remote grantor, and to him, nothing beyond the meander line of the lots described in such patent. To reverse this judgment the plaintiff in error brings the writ of error which it is now moved to dismiss.

ARGUMENT.

I.

WHAT PLAINTIFF IN ERROR CLAIMS.

Plaintiff in error claimed, and contended in the courts below, that a proper construction of the survey and patent to Anthony, his remote grantor, gave riparian rights along Mud Lake covering the land in dispute.

That claim is distinctly and specially set up in his petition.

Record pp 1 & 2.
Brief of Defendants in Error, pp 5 & 6.

This contention was distinctly sustained by the decree of the trial court in his favor as set forth in the foregoing statement of facts. (See p 3, supra.) It was distinctly rejected and denied by the Supreme Court of Iowa, which said in its opinion:

"Plaintiff's claim was once before presented to this Court in an action of a similar nature to this, but against a different defendant. See Schlosser vs. Cruickshank, 96 Iowa 414. Plaintiff was then successful." * * * *

"It is undisputed that the meander line did not correctly indicate the shore line of the lake, as it was originally run. In the former case we found on the evidence before us, that there was a tract of about one hundred acres between said line and the actual shore of the lake.

"When a body of water is meandered, such lines are not run as boundaries, but merely for the purpose of defining the sinuosities of the shore and as a means of ascertaining the quantity of land to be paid for by the purchaser.

Schlosser vs Cruickshank, supra, and authorities therein cited.

"In such a case if the meander line does not coincide with the bank of the lake, but is so run that land lies outside and between it and the shore, the adjoining owner will usually take title to the actual shore line. And it may doubtless be properly conceded that no subsequent resurvey by the Government in the absence of fraud or error so gross as to be in the nature of a fraud in the original survey, could affect his title thereto. * * * That there was swampy and low land in section 30 north of plaintiff's lots admits of no question and in wet seasons doubtless a large part of it was covered at times with water, but we are equally clear that no permanent body of water of any considerable extent exi ted there. * * * * The meandered lake which gives rise to this controversy is called Mud Lake and as must be manifest from what we have said, lies north of plaintiff's land."

Record pp 126, 127, 128.
Brief for Defendants in Error, pp 21, 22.

That court, therefore, decided, and necessarily decided —it was compelled to decide in order to defeat the title of plaintiff in error—that the legal effect of the patent specially set up by him, and under which he specially claimed, in connection with the government survey and plat, did not give him title to the land in controversy.

That question, we shall see, was, under the decisions of this court, a federal question.

The ground upon which the learned Supreme Court of Iowa arrived at this conclusion is thus stated in its opinion;

"While it is true that the significant question before us is the condition that existed *when the original survey was made*, and that attempt to show this must usually involve much uncertainty because of the great changes that lapse of time and cultivation of surrounding lands have made in the wet lands and inland waters, *yet it appears beyond question here that the meander line was not correctly run in the first instance, and we think it satisfactorily disclosed* that no body of water *necessary* to be meandered then existed where Mud lake is shown on the plat to be." The italics are ours:

Record p 128.
Brief of Defendants in Error, p 24.

Thus while it is conceded by that tribunal that the meander line of the lots described in the patent under which the plaintiff in error claims was so run, as shown by the government plat and survey, that he would under all the authorities,

be entitled to lands north thereof as far as the shore of the lake—i. e., to the high water line of the lake—yet his title is defeated upon the ground that "we *think* * * * that no body of water necessary to be meandered then existed where Mud Lake is shown on the plat to be."

In other words, the *ipse dixit* of this learned tribunal, nearly a half century after the government surveys, under which plaintiff in error claims—without pleading and a scrap of evidence as to the character of Mud Lake at the time the survey was made—is set up to over-turn this survey, and to over-turn the title of plaintiff in error.

This presents a *federal question*. We hardly need to point out that the claim of plaintiff in error under the patent, survey, and plat, is a claim under "authority exercised under the United States," which authority was distinctly repudiated and denied, and decided against, by the court below.

The 6th, 7th, 8th, 9th and 10th assignments of errors, especially the latter, distinctly present these questions for determination in this court. (Record p 131; Brief of Defendants in Error, pp 26, 27).

II.

FEDERAL QUESTION.

In a case where the writ of error was to the Supreme Court of Oregon, the plaintiff in error claimed under a patent to certain fractional lots, the government survey and plat of which showed that the lots were bounded on the north by the meander line of Malheur lake. It was claimed for the defendant that no part of this lake was in front of the lots, and, as stated in the opinion in the case, "if the east and west exterior lines of said lots were extended north indefinitely they would not touch or intersect the margin or border of the lake, but would leave it entirely to the east thereof; * * * that the border of the lake never at any time extended to the supposed meander line." (185 U. S., 50.) This question of fact was submitted to a jury who found against the plaintiff in error, whereupon judgment was rendered against him, which judgment was affirmed by the Supreme Court of Oregon, and a writ of error taken from this court to said tribunal. This court said, passing upon the jurisdictional question, opinion by Mr. Justice Shiras:

"As the case went off in the Oregon courts on this question of fact, it may be questionable whether any matter of Federal law is left open for our revision. However, as the plaintiff in error contended, in the courts below and in this court, that a proper construction of the survey and patents gave riparian rights covering the land in dispute, and that

it was not competent to overcome such rights by evidence affecting the legal import of the plats and patents, we think a Federal question is thus presented.

"For the reasons already given, we think that, while the plats are conclusive as to the meander line, and while *if there was a lake abutting on or to the north of the lots, the plaintiff in error would take all land between the meander line and the water, and all accretions,* it was competent for the defendant to show that there was not, at the time of the survey nor since, any such lake, and to contend that, in such a state of facts, there could be no intervening land and no accretion by reliction."

French-Glenn Live Stock Co. vs Springer, 185 U. S., 54.

If in that case where as a matter of fact, tried to and found by a jury, there was no body of water whatever adjoining the meander line, it was still a federal question as to the construction of the survey and patents under which plaintiff in error claimed, how much more is a federal question presented in the case at bar where a body of water existed in front of the meander line at the time of the survey, and continues to exist up to the present time, the only question regarding it being its character, permanency, and depth.

We submit that this Oregon case is conclusive that a federal question is shown by the Record in the case at bar.

In a later case brought on error to reverse the judgment of the Supreme Court of Indiana, the plaintiff claimed through mesne conveyances under a patent of the United States conveying fractional sections fronting upon a meander line on certain non-navigable water, its claim being to land beyond the meander line under riparian rights; the defendant, as in the case at bar, claimed under a subsequent survey ordered by the Land Department. The decision in the state courts was in favor of the plaintiff. The majority opinion of this court made no question that a federal question was presented, nor does the question appear to have been raised by counsel in the case either by motion to dismiss, or otherwise.

Upon the ground that by the common law as interpreted and recognized by the courts of Indiana, plaintiff's patents included the riparian rights contended for, and the land in controversy, this court affirmed the judgment of the Supreme Court of Indiana. There was a dissenting opinion, by Mr. Justice White, concurred in by Mr. Justice McKenna. In this dissenting opinion it is said:

"The right of the defendants under patents of the United States, which they specially set up, having been denied,

because it was conceived by the court below that no title vested in them under the laws of the United States, it would seem that the question arising for decision is this: Did the court correctly interpret the statutes of the United States?

"This is a Federal question. But it is pressed that what title to the beds of the lakes passed to the State from the United States, either under the swamp land act or in virtue of the patents issued to the State, is to be determined, not by the law of the United States, but solely by the state or local law; hence it is insisted the case must be decided by the law which is rightfully applicable to it and not by the law of the United States, which the Supreme Court of Indiana erroneously deemed was essential to its decision. If I entertained the opinion that the state or local law governed, and in consequence that this case was to be disposed of by considerations inherently local, I would, of course, be obliged to conclude that the controversy must be judged by that law which properly controlled it and not by the law of the United States, which was mistakenly applied by the lower court. In that view my mind would be driven to the conclusion that this case should be dismissed for want of jurisdiction, since here there is no authority to review the action of the state court in a case inherently depending upon the state or local law." (190 U. S., 474–5.)

The majority opinion in the case awarded the land to the plaintiff under the local or state law; that is, the local or state interpretation of the common law, as already pointed out. In retaining and deciding the case, therefore, this court necessarily held, notwithstanding this feature of the case, that the question of the effect of the patents under which the plaintiff claimed was a federal question, and declined to yield to the reasoning of Mr. Justice White in the dissenting opinion. We apprehend that if this court had been of opinion that no federal question was presented in the view of the case as decided by it, and as urged by Mr. Justice White, it would, passing upon its own jurisdiction, as it is always bound to do, have dismissed the case *sua sponte*.

This very late case also seems to us decisive against the contention of defendants in error in the case at bar. It is the case of

Kean v Calumet Canal Co., 190 U. S., 452.

In a case decided in 1893 arising on error to the Supreme Court of Oregon there was involved a donation claim under Act of Congress of September 27, 1850. The government patent decribed the land as bounded by the Columbia river. The question involved under the patent was whether claimants under it took title to land below high water mark. The Supreme Court of Oregon held that they did not.

The jurisdictional question in this court was, therefore, substantially the identical question presented by the motion of defendants in error to dismiss in the case at bar.

In determining this jurisdictional question it was said in the Oregon case, opinion by Mr. Justice Gray:

"The judgment against its validity proceeded upon the ground that the grant from the United States upon which it founded passed no title or right, as against the subsequent deeds from the state, in lands below high water mark. This is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a Federal question within the appellate jurisdiction of this court. Rev. Stat. Par. 709. That jurisdiction has been repeatedly exercised, without objection or doubt, in simi'ar cases of writs to the state courts. Railroad Co. v Schurmeir, 7 Wall., 272; Packer v Bird, 137 U. S., 661; Knight vs United States Land Association, 142 U. S., 161. * * * * The present case being clearly within our jurisdiction, we proceed to the consideration of its merits."

Shively v Bowlby. 152 U. S., 9 & 10.

These authorities are very pursuasive, and, indeed, we think, conclusive upon the precise question involved in the case at bar.

2. Furthermore, in a case where the evidence shows without conflict that there was an actual body of water known as Mud Lake, which continues to the present time and with reference to which a meander line was actually run, and this survey was accepted by the Land Department, and patent issued thereunder to plaintiff's remote grantor, we emphatically deny the jurisdiction or power of the state courts to review the action of the Land Department and to hold, nearly half a century after the survey and more than a quarter of a century after the patent, that the body of water was not "proper" to be meandered.

The synonyms of "proper" according to standard dictionaries are: "Admissible"; "Appropriate"; "Becoming"; 'Convenient"; "Modest";

Whether the matter is to be construed from the standpoint of modesty, convenience, admissibility, or otherwise, the questions are obviously for the Land Department, and not for the courts.

Especially is this so where there is no evidence whatever as to the actual condition of the lake at the time of the survey, and for many years thereafter, and where the court below itself said this question "must usually involve much uncertainty because of the great changes that lapse of time and cultivation of surrounding lands have made in the wet lands and inland waters."

This assumed power of the learned court below involves an essential and inherent federal question. It is found in the very dictum of the court itself. It involves the legal effect of the patent under which plaintiff claims under the land laws, public surveys, and action of the Land Department of the United States as construed and determined by the decisions of this court.

The very invention and enforcement of such a theory by the court of last resort of a state gives plaintiff in error the right to combat and contest that theory as a federal question in this tribunal.

To hold otherwise is to unsettle and to bring into distressing uncertainty land titles derived from the Government over a great area of country, including many great states, and to make them dependent upon the notions of propriety, or what is "proper" on the part of local tribunals, which must in turn involve wet seasons and dry seasons, or a succession of them, and when reduced to ultimate terms depend essentially upon the weather, and possibly upon the prognostications of the weather bureau.

The patent under which plaintiff claims title conveys his fractional lots "according to the official plat of the survey of the said land returned to the General Land Office by the Surveyor General." (Record p 120.)

The decision of the court below rejects the official plat and survey as not "proper", and thus in terms decides against the authority exercised under the general government under which plaintiff in express terms claims title to the land involved. The plat, survey, and field-notes, showed a meander line with reference to the margin of Mud Lake.

"In preparing the official plat from the field-notes the meander line is represented as the border line of the stream, and shows to a demonstration that the water course and not the meander line as actually run on the land is the boundary."

Ry. Co. v Schurmeir, 7 Wall., 287.

"The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the Federal and state courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary."

Hardin v Jordan, 140 U. S., 380.

Such is the undoubted legal effect of a government patent of land fronting upon a meander line along a body

of water. This legal effect of the patent under which plaintiff claims has been recognized and enforced by the Supreme Court of Iowa with reference to the very land in controversy.

Schlosser v Cruickshank, 96 Ia., 414.

That learned court says in its opinion in the case at bar:

"Plaintiff's claim was once before presented to this court in an action of a similar nature to this but against a different defendant. * * * In the former case we found on the evidence then before us that there was a tract of about one hundred acres between said line and the actual shore of the lake." (Record p 126.) (Brief for Defendant in Error, p 21.)

"The meandered lake which gives rise to this controversy is called Mud Lake, and, as must be manifest by what we have said, lies north of plaintiff's land."

"We have, then, to determine whether there was a body of water in section 30 PROPER to be meandered." (Record p 127.) (Brief for Defendants in Error, p 22.)

And thereupon plaintiff's title was over-turned by denying to the patent the legal effect which that learned court had once given to it, and to which it was and is entitled under repeated decisions of this court. We think this legal effect of the patent and of authority exercised under the Government in its issuance, is not to be thus denied and nullified on a matter of "propriety" without involving a federal question. The court below was without power to thus nullify a government patent and an authority exercised under the Government.

"Great confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of Public Lands could do."

Haydel v Dufresne, 17 How., 30.

"That the power to make and correct surveys of the public lands belongs to the political department of the government and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; *and that the latter* have no concurrent or *original power to make similar corrections*, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient."

Cragin v Powell, 128 U. S., 698-9.

"It would lead to endless litigation and be fruitful of evil if any supervisory power were vested in the courts over the action of the numerous officers of the Land Department on mere questions of fact presented for their determination."

Quinby v Conlan, 104 U. S., 426.

"It is this unassailable character (of the patent) which gives to it its chief, indeed its only, value, as a means o quieting its possessor in the enjoyment of the lands it em braces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence."

Smelting Co. v Kemp 104 U. S., 641.

Some of these opinions were in actions at law, but they are equally applicable in chancery proceedings where similar questions are involved, as in the case at bar. It is surely a matter of unpleasant surprise to find the decisions of the learned and distinguished court of last resort for a great state and in chancery proceedings as conflicting and uncertain touching this same patent as the verdicts of juries depicted in the case of Smelting Company v Kemp, *supra*; and this condition strikingly illustrates the distressing uncertainties touching land titles which must result if juries or courts may review the action of the Land Department as ot what is "proper" in the surveying of public lands, and the issuance of patents therefor.

If, in addition to this, it can be said that the legal effect of a patent can be annulled by a state court upon the ground of propriety or impropriety in the action of the Land Department, and that no federal question is thus presented, the condition of holders and claimants under government patents will be distressing indeed.

Nor can a re-survey, ordered and made long after the issuance of the patent under which plaintiff claims, with subsequent patents issued after such survey in any manner

touch or affect plaintiff's title. Precisely in point on this question is,

Hardin v Jordan, 140 U. S. 400-1.
Kean v Calument etc Co., 190 U. S., 461,
Grand Rapids, etc., Co. v Butler, 159 U. S., 94-5.
Ry. Co. v Schurmeir, 7 Wall., 289,

And see, Davis v Weibbold, 139 U. S., 507,
Moore v Robins, 96 U. S., 533-4.

It should be further remarked that this is a suit in equity. The plaintiff in error expressly set up in his petition the patent under which he claimed, the meander line of the lake, and his rights with reference to such meander line under the patent.

The defendants in error did not deny the existence of the lake, or assert that it was not a permanent body of water, nor in any manner call in question the propriety, or even the strict legality and rightfulness of the meander line. These issues were discovered and injected into the case for the first time by the learned court below the Court of last resort for Iowa. It is, of course, easy for a court to frame new issues, argue them for itself, apply evidence to them, or bring the questions raised by them to some standard of supposed "propriety", and decide them with reference to that standard against a party litigant whose landed estate is involved. But if his land may thus be taken from him as against a government patent and its legal force and effect in connection with the public plats and land surveys, and he may then be told that no federal question is involved as against his government patent which is his muniment of title, because what is "proper" in land surveys is a question of fact for the decision of the state courts, then a summary manner of disposing of government titles has been found which makes folly of all the cases in the books.

III.

CASES CITED FOR DEFENDANTS IN ERROR.

The only case cited for defendants in error in the brief of their learned counsel upon the motion to dismiss, requiring comment in our view, is that of,

Sweringen v St. Louis, 185 U. S., 45.

In that case, indeed, the plaintiff in error claimed title under a government patent; but the patent conveyed the land by metes and bounds, and the sole question involved in the state court was the location of the lands conveyed by correctly tracing the metes and bounds upon the surface of the earth. The question was simply the identification of the lands conveyed, as it might have been in the case of any

farm or private grant conveyed by like metes and bounds. It was found and adjudged by the state court that the metes and bounds did not carry the east line of the land conveyed to within some hundred of feet of the west bank of the Mississippi river. This court said:

"There was no contention made as to the authority of the government to convey the land to the bank of the river where the water was actually flowing if it chose to do so. The decision did not touch the question as to how far a grant by the government, of land bounded by the waters of a navigable stream, would carry title, whether to high water or low water, or out to the middle of the stream. (p. 41.)

"It is not the case of granting lands bounded by the waters of a navigable river and a claim made to an island in the river in one case and to the lands under water in the other, where the validity of the authority exercised, to the extent claimed, was drawn in question, and the right to convey the land denied. * * * * But it was simply maintained that making correct measurements and construing the language of the grant in the usual and ordinary way applicable to such instruments, (not at all a federal question) *the courses and distances* set forth in the patent and its general description of the land conveyed did not *as a matter of fact bring the eastern boundary to the waters of the river.*" (pp. 43-44.)

The distinction between that case and the case at bar, as well as the cases cited, *supra*, which are substantially in point with the case at bar, is so obvious that discussion would perhaps be unpardonable; at any rate we do not discover the necessity of such discussion to elucidate the clear distinction.

Respectfully submitted,

CHAS. A. CLARK,
GEO. E. CLARKE.
For Plaintiff in Error.